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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1082

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO AND COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, ET AL.,
Respondents.

On a Writ of Certiorari to the United States Court of Appeals for The District of Columbia Circuit

BRIEF OF THE AIR CONDITIONING & REFRIGERATION INSTITUTE, AIR MOVEMENT AND CONTROL ASSOCIATION, INC., AMERICAN BOILER MANUFACTURERS ASSOCIATION, AMERICAN CONSULTING ENGINEERS COUNCIL, ARCHITECTURAL WOODWORK INSTITUTE, NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS, AND NATIONAL WOODWORK MANUFACTURERS ASSOCIATION, INC., AS AMICI CURIAE

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INTRODUCTION

This brief on behalf of the Air Conditioning & Refrigeration Institute, Air Movement and Control Association, Inc., American Boiler Manufacturers Association, American Consulting Engineers Council, Architectural Woodwork Institute, National Society of Professional Engineers, and the National Woodwork Manufacturers Association, Inc., as amici curiae, is filed pursuant to the written consent of the parties under Rule 42(2) of this Court. The amici herein support the position of the petitioner, the National Labor Relations Board.

INTEREST OF THE AMICI CURIAE

The associations participating in this brief have substantial and long-standing interest in the effective implementation of the statutory prohibitions against secondary boycotts, particularly when those boycotts are purportedly undertaken to "preserve" work for union members and have the effect of restricting the use of new technologies. The amici represent a broad cross-section of the construction industry, including designers, engineers, manufacturers and contractors. Members of the American Consulting Engineers Council (ACEC) and the National Society of Professional Engineers (NSPE) design, specify and provide engineering services on all types of construction projects and therefore have a major role in determining the materials, components and methods to be used in construction. Members of the American Boiler Manufacturers Association (ABMA), the Air Movement and Control Associaiton (AMCA), the Air Conditioning & Refrigeration Institute (ARI), the Architectural Woodwork Institute (AWI), and the National Woodwork Manufacturers Association (NWMA), manufacture materials and components used in construction throughout the United States.

The amici joining herein, therefore, have broad experience with the problems arising out of secondary boycotts effectuated through diverse union conduct. Moreover, they have participated individually, jointly and with other industry associations in numerous cases before the National Labor Relations Board ("the Board" or "NLRB") and the courts in which interpretation and application of the secondary boycott provisions of the National Labor Relations Act ("Labor Act" or "NLRA") were in issue.*

The cargo container rules at issue in this case are purportedly designed to protect longshoremen against the loss of work resulting from technological advances in the shipping industry. Rules such as these, however, often impair productivity by limiting cost-saving devices, including the use of prefabricated materials and other innovative and economical techniques which, in the case of the construction industry, are developed regularly by members of the amici. Accordingly, these amici have a strong interest in insuring that overly broad union "work preservation" practices in the shipping industry are declared un-

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* *See, e.g., NLRB* v. *Enterprise Ass'n, Pipefitters, Local 638*, 429 U.S. 507 (1977); *Connell Construction Co.* v. *Plumbers Local 100*, 421 U.S. 416 (1975); *National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612 (1967); *Chamber of Commerce, et al.* v. *NLRB*, 574 F.2d 457 (9th Cir. 1978); *Allied Concrete, Inc.* v. *NLRB*, 102 L.R.R.M. 2508 (9th Cir.); *Muko* v. *Southwestern Pennsylvania Building and Construction and Trades Council, et al.*, 99 LRRM 2001 (3d Cir. 1978).

lawful, lest they lead to a judicially-sanctioned proliferation of such practices in the construction industry.

The potential impact of this case on the construction industry, and thus upon the way in which these amici develop methods, materials and components for use in construction, is clearly demonstrated by the opinion of the court of appeals below. In ruling that the cargo container rules were not unlawful, the District of Columbia Circuit relied upon this Court's "work preservation" doctrine as formulated and applied in *National Woodwork Manufacturers Association* v. *NLRB*, 386 U.S. 612 (1967), and *NLRB* v. *Enterprise Association of Pipefitters*, 429 U.S. 407 (1977). Those cases, in which the amici participated, as a party in the former case and jointly as amici curiae in the latter, defined the lawful limits for construction industry agreements which proscribe the subcontracting of work to non-bargaining unit employees. In both cases, as well as in others, the amici have advocated effective implementation of the federal labor and antitrust laws to prevent unwarranted restrictions upon the use of competitive, efficient methods and materials in construction. Since we believe the court of appeals' decision in this case sets forth an erroneous application of Sections 8(e) and 8(b)(4)(B) which is likely to undermine this Court's work preservation and right-to-control doctrines as articulated in those cases, the interest of the amici in these review proceedings is clear.

SUMMARY OF ARGUMENT

1. In his opinion for the District of Columbia Circuit, Judge Wright asserts that the NLRB (and by implication, the courts which have upheld the Labor Board on this issue) have misinterpreted and misapplied the doctrine of work preservation by failing to consider "all the surrounding circumstances," particularly the "traditional work patterns" of longshoremen. Crucial to Judge Wright's rationale is his conceptual view of the proper approach to technological innovation, which colors the court's factual analysis of the work in controversy:

> When a technological innovation is introduced in the workplace, new work may be created and may initially be performed, as in these cases, by employees other than those who worked with the old technology. The crucial question is how best to rationalize the work that results from the innovation into traditional work patterns. Cert. Pet. at 47a.

From this "rationalization," the court of appeals found that the work in controversy must be defined "based on work patterns both prior and subsequent to the innovation." *Id.* In remanding the case to the Board with instructions to apply the court's "work preservation" concept, the court intimated that whenever technological changes result in the creation of new work which displaces some older method of operation, the employees who did the older work have a legitimate claim to the new operations unless the new work is so different from the old that it constitutes a clear break from the past.

As set forth more fully in the argument, the amici curiae joining in this brief submit that the circuit

court's interpretation and application of the Court's *National Woodwork* decision is contrary to the letter and to the logic of settled law. Since *National Woodwork*, it has been well-established that "work preservation" boycotts and agreements are permitted under Section 8(b)(4)(B) and 8(e), but those with "work acquisition" objectives are not. In accordance with that decision, the Board has looked to the work in controversy, "since that is the predicate upon which the issue of work preservation must turn". *ILA (Consolidated Express, Inc.)*, 221 N.L.R.B. 956, 959 (1975), *enf'd*, 537 F.2d 706 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041, *reh'g denied*, 430 U.S. 911 (1977). As it has in a number of container-related cases previously, the Board has determined that the work in controversy as such is the container work being performed by the consolidators at their off-dock premises, and thus is not within the work traditionally performed by longshoremen of loading and unloading ships—an approach that has been endorsed by a number of circuit courts. *See, e.g., id.; ILA, Local 1575*, 226 N.L.R.B. 34 (1976), *enf'd*, 560 F.2d 439 (1st Cir. 1977); *Humphrey* v. *ILA*, 548 F.2d 494 (4th Cir. 1977).

The circuit court's standard for determining the legality of the container agreement mischaracterizes the entire dispute. By formulating the question involved in the case as one of "rationalizing" into "traditional work patterns" work resulting from technological innovation, the court prejudges the very issue in dispute by presuming that the new work necessarily fits within a previous work pattern of the affected industry. In fact, the evidence indicates that such is not the case. Rather, an analysis of the

work in controversy reveals that, as found by the ALJ, "the traditional on-pier work of longshoremen has not included the work performed by the employees of motor carriers . . . at their off-pier facilities." Cert. Pet. at 165a.

Since ILA workers traditionally have performed the stuffing and stripping required for the convenience of the shipping lines' customers but have not traditionally performed the stuffing and stripping performed by truckers and consolidators for their own shipper-customers, enforcement of the Rules of Containers sought to acquire "neither unit work nor fairly claimable . . . unit work." Cert. Pet. at 20, *citing Meat & Highway Drivers, Dockmen, Etc., Local 710* v. *NLRB*, 335 F.2d at 713). The circuit court's new formulation, however, *presumes* the stuffing and stripping performed by consolidators for their own customers historically belongs to the longshoremen, and thus seeks a compromise or "rationalization" on a point already conceded. Such an interpretation of *National Woodwork* would thwart the technological progress of the nation in favor of restrictive work rules before ever reaching the question of work acquisition.

2. The "right to control" test, as evolved, refined and currently applied by the Board, is of immense practical value in implementing the intent of Congress to eliminate secondary boycotts in the construction industry. In an inappropriate and out-of-context makeweight argument, the circuit court discusses the applicability of the construction industry "right to control" test, and finds that the primary employers in this case (the shippers) control the work in controversy in that they control "the disposition of all

the containers at issue." Cert. Pet. at 56a. However, since there is nothing in the record to indicate that those who contracted with the motor transport carrier to haul their freight to or from the docks made any specification regarding how, where, or by whom their goods were to be handled, there is no right to control issue present. As the government observes, "[r]efusal to supply containers was only a means chosen by the parties to the Rules on Containers to enforce them and, as such, was an inherent element in the secondary boycott itself; it did not evidence 'control' over the work in controversy." Cert. Pet. at 22.

3. The amici are particularly concerned with the policy implications of the circuit court's opinion. If the court's extremely broad approach to "work preservation" issues prevails, victims of product boycotts will be unable to overcome a "work preservation" defense unless, perhaps, the service or product being supplied is completely unlike that which has been used before. That new work has to be done at a different location (*e.g.*, in a factory rather than at the jobsite) or that it requires special equipment or special training, are seemingly eliminated as factors to be considered by the court in resolving product boycott disputes.

As with the cost-reducing benefits inherent in cargo container development, the use of prefabricated, prefinished and factory-assembled components in construction represents significant economic gains for the entire nation. Overly-broad protection of restrictive union work rules such as in the case here seriously undermines the secondary boycott prohibitions of the Labor Act, as well as fundamental tenets of antitrust policy, and thus thwarts national economic progress.

ARGUMENT

I. THE COURT OF APPEALS MISINTERPRETED AND MISAPPLIED THE "WORK PRESERVATION/WORK ACQUISITION" FORMULA, AND GAVE INSUFFICIENT WEIGHT TO THE BOARD'S RATIONALE, WHICH IS CONSISTENT WITH THIS COURT'S *NATIONAL WOODWORK* DECISION

A. The Board's Role and Approach in Determining Tests for Secondary Activity.

It is well settled that a violation of Sections 8(b)(4)(B) and 8(e) is dependent upon a finding of a secondary object. The problem lies in the method of identifying such object. Conduct directed at an employer with whom the union has a dispute is "primary" activity and lawful under the statute. Conduct directed at others is secondary and unlawful. *National Woodwork Manufacturers Association* v. *NLRB*, 386 U.S. 612, 635 (1967); *Local 761, Electrical Workers (General Electric)* v. *NLRB*, 366 U.S. 672-673 (1961). Drawing the line between primary and secondary activity has not been easy and has, therefore, been marked by an evolutionary process. In the words of Justice Frankfurter:

> The nature of the problem, as revealed by unfolding variant situations, inevitably involves an evolutionary process for its rational response, not a quick, definite formula as a comprehensive answer. And so, it is not surprising that the Board has more or less felt its way during the fourteen years in which it has had to apply § 8(b)(4)(A), and has modified and reformed its standards on the basis of accumulating experience. 'One of the purposes which lead to the creation of such boards is to have decisions based

> upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration.' Republic Aviation Corp. v. Labor Board, 324 U.S. 793, 800. *Local 761, Electrical Workers (General Electric)* v. *NLRB*, 366 U.S. 667, 674 (1961).

The Board's decision in the present case is the natural result of this evolutionary process going on over a long period of time. Because a definite formula may not have been wise when the statute was first enacted, it does not follow that a clearly understandable rule cannot evolve after years of experience.

The Board has the initial responsibility for making determinations of secondary activity, and its efforts to draw appropriate lines and establish rules for doing so have been widely accepted in the past. *Local 761, Electrical Workers* v. *NLRB*, *supra*, 366 U.S. at 671-680; *Local 1976, United Bhd. of Carpenters, et al.* v. *NLRB*, 357 U.S. 93 (1958); *Houston Insulation Contractors' Ass'n* v. *NLRB*, 386 U.S. 664 (1967). Such rules express a "practical judgment on the effect of union conduct in the framework of actual labor disputes and what is necessary to preserve to the employer the freedom of choice that Congress has decreed. On such a matter the judgment of the Board must be given great weight, and we ought not to set against it our estimate of the relevant factors." *Local 1976, United Bhd. of Carpenters, et al.* v. *NLRB*, 357 U.S. 93, 107 (1958).

Over the course of the past decade, the Board has repeatedly evaluated the secondary impact of cargo-container rules in the maritime shipping industry. It has had occasion in a number of cases to evaluate

the "surrounding circumstances" of such alleged "work preservation" instruments, as required by this Court's decision in *National Woodwork*, 386 U.S. at 644, and has consistently rejected, as unlawful secondary activity, longshoremen's unions' efforts to acquire container-related work which was being performed by outside employers. See *ILA, Local 1575*, 226 N.R.L.B. 34 (1976), *enf'd*, 560 F.2d 439 (1st Cir. 1977); *ILA, Hampton Roads Dist. Council*, 225 N.L.R.B. 1066 (1976); *ILA, Local 1248 (Naval Supply Center)*, 195 N.L.R.B. 273 (1972); *ILUW, Local 13 (Cal. Cartage Co.)*, 208 N.L.R.B. 994 (1974), *enforced mem. sub nom. Pacific Maritime Ass'n* v. *NLRB*, 515 F.2d 1018 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 942 (1976); *ILA (v. Consolidated Express, Inc.)*, 221 N.L.R.B. 956 (1975), *enforced*, 537 F.2d 706 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041, *reh'g denied*, 430 U.S. 911 (1977). *Cf., ILA, Local 1418 (New Orleans Steamship Ass'n)*, 235 N.L.R.B. 161, 167 (1978); *ILA, Local 1410 (Mobile Steamship Ass'n, Inc.)*, 235 N.L.R.B. 173, 178 (1978).

The *Consolidated Express* case is particularly instructive in demonstrating the Board's view of how cargo-container rules promote secondary objectives. After the Board acknowledged the longshoremen's claim that such rules were designed only to preserve work to which they were entitled, it cautioned that "if the ILA's real object was to obtain either work traditionally performed by employees not represented by ILA or work to which ILA had abandoned all claims, then the pressures on [the shippers] and the contractual arrangements would have a secondary object and would violate [the Act]." 221 N.L.R.B. at 959. The Board ruled that in order to evaluate prop-

erly the validity of the work claim, "it is essential to define with some precision *the work in controversy* since that is the predicate upon which the issue of work preservation must turn." *Id.* (emphasis added). It determined that the "work in controversy" was the container work being performed by the consolidators at their off-dock premises, and as such was distinguishable from the traditional work of longshoremen of loading and unloading ships. On review, the Court of Appeals for the Second Circuit affirmed the Board decision.

Applying its rationale in *Consolidated Express* to the facts here, the Board logically concluded that ILA's demands could be satisfied only "if the work traditionally performed off the pier by employees outside the longshoremen unit were taken over and performed at the pier by longshoremen represented by ILA," Cert. Pet. at 164a, *citing* 221 N.L.R.B. at 960, and that *the history of the longshoremen's work tradition* did not encompass such off-pier work. By looking to the work of the unit employees in terms not only of what they did, but where they performed their work and who they performed their work for, the Board utilized a logical and systematic method for determining the union's true objective in light of all the relevant surrounding circumstances.

B. Court Acceptance of the Board's Approach

This Court has not specifically ruled on the validity of the Board's approach to container rules, although it has had an opportunity to do so twice in the past and has declined. Interestingly, the Board's decisions in those cases declaring the container rules unlawful were enforced by the circuit courts, in one instance

by the very circuit court that now seeks to cast aside the Board's consistently applied evaluation. *ILWU, Local 13 (Cal. Cartage Co.)*, 208 N.L.R.B. 994 (1974), *enforced mem. sub. nom. Pacific Maritime Ass'n* v. *NLRB*, 515 F.2d 1018 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 942 (1976); *Consolidated Express, Inc.*, 221 N.L.R.B. 956 (1975), *enforced*, 537 F.2d 706 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041, *reh'g denied*, 430 U.S. 911 (1977).

In addition to these decisions, opinions by both the First and the Fourth Circuits have endorsed the Board's approach as well. See *ILA, Local 1575* v. *NLRB*, 560 F.2d 439 (1st Cir. 1977); *Humphrey* v. *ILA*, 548 F.2d 494 (4th Cir. 1977).

In affirming the Board's emphasis upon "the work in controversy," and in finding such work to be the container loading and unloading performed by consolidators at their off-pier premises, the Second Circuit unequivocally declared the Board's approach to be "supported by substantial evidence and by sound analysis," *Consolidated Express*, 537 F.2d at 712. The First Circuit similarly found that "[t]he Board's definition of the work in question as the stripping and stuffing of vans consigned to freight consolidators is supported by substantial evidence and within its discretion." *ILA, Local 1575* v. *NLRB*, 560 F.2d at 447. "Once we accept this definition," the court declared, "we readily agree that the work in question was not traditionally done by the longshoremen." *Id.* The Fourth Circuit also expressed no doubt that the Board's approach was appropriate:

> [I]t would seem evident that the 'stripping' of these full shipper's loads by the truckers is not part of the process of loading and unloading the

> cargo of ships; rather it is done to facilitate and as part of the motor carrier's task of transporting the goods from the pier to the consignee. Consequently (and not surprisingly), this work has traditionally been performed by employees of the motor carrier. It follows that such 'stripping' does not fall within the bounds of the longshoremen's traditional role and that the challenged rules are unlawful 'work acquisition' measures .... (Footnotes and citations omitted.)

Humphrey v. *ILA*, 548 F.2d at 499.

Thus, the Board and numerous courts that have considered the question have found that "work preservation" agreements, lawful under *National Woodwork*, do not embrace union efforts to obtain assignments which are not currently held by the membership, and which, in fact, are being performed by other employees for a different employer and at a different location. As we shall demonstrate below, by emphasizing what it perceives as the similarity in the nature of the work involved, the court of appeals' adoption of a "rationalizing" test abandons these cases, and with them, fundamental principles for distinguishing between primary and secondary activity.

C. The Court of Appeals' Approach to *National Woodwork* Is Without Merit

The majority of the court below expresses the belief that the Board's focus on the work in controversy without an analysis of traditional work patterns misses the primary-secondary distinction in *National Woodwork*. The majority opinion views the distinction as requiring an analysis of how best to "rationalize" work resulting from technological in-

novation into traditional work patterns. This reasoning, however, ignores the critical Board finding, consistent with "work preservation" principles, that traditional work patterns must be evaluated in terms of the situs, as well as the nature of the work involved. The Board thus adopted the ALJ's findings that:

> The advent of containerization in the ports of Baltimore and Hampton Roads did not change the traditional role of the ILA longshoremen. The motor carriers have treated import shippers' loads destined for consignees located more than 50 miles from the center of the port of entry much as they did break-bulk cargo. For, with very rare exceptions, motor carriers have freely picked up the steamship company's containers mounted on wheeled trailers and hauled them to the consignee in accordance with the bills of lading. The motor carriers have also traditionally hauled such containers to their own truck terminals and have stripped the shippers' loads from them and are loaded into their own trailers, using truck terminal employees, whenever considerations of safe regulation, safety, or economy persuaded a motor carrier to take that precaution. (Emphasis supplied) Cert. Pet. at 164a.

Given the traditional work patterns of the maritime shipping industry, the ALJ appropriately concluded that "the traditional on-pier work of longshoremen has not included the work performed by the employees of motor carriers . . . at their off-pier facilities." Cert. Pet. at 165a.

Basic to the court's misinterpretation of *National Woodwork* is its misconception of the Labor Act's role in addressing labor disputes that emanate from technological progress. The court's "rationalizing"

test fails to recognize that the Labor Act protects those who introduce technological change, along with their employees, if such change incorporates new kinds of materials or methods at a different location. By insisting that all innovative work methods be evaluated along traditional work patterns regardless of changes in industrial and commercial technique, the court would freeze job tasks at a historical point and engage in a procrustean exercise to match novel work methods with older work skills. The court's open-ended approach to "work preservation" thus would emasculate the secondary boycott prohibitions in the Labor Act, which were designed, in part, to prohibit such economically deleterious protectionism. *Cf.*, II Legislative History of the Labor Management Reporting and Disclosure Act of 1959, 1431 (Sen. Kennedy); 1598 (Rep. Griffin).

II. THE COURT OF APPEALS' RELIANCE ON THE RIGHT TO CONTROL DOCTRINE IS MISPLACED AND, IF UPHELD, WOULD SERIOUSLY IMPAIR THE SECONDARY BOYCOTT PROSCRIPTIONS OF THE ACT

Congress recognized in 1947, when it included secondary boycott restrictions in the Taft-Hartley amendments, and again in 1959, when it amended those restrictions, that economic efficiency depends, in large measure, on the elimination of product boycotts. The right to control doctrine, as applied in current Board decisions, offers an effective method to implement Congressional efforts to eliminate secondary boycotts in the construction industry. A critical ingredient in right to control, of course, is defining the work in dispute. In this regard, the court below errs.

The court of appeals finds that the primary employers in this case (the shippers) control the work in controversy in that they control "the disposition of all the containers at issue." Cert. Pet. at 56a. It is not the containers, however, that are in dispute. The dispute centers around the stuffing and stripping of those containers, which are performed by truckers and consolidators for their own shipper-customers. Those who contract with the motor carrier to haul their freight to or from the docks do not specify how, where, or by whom their goods are to be handled. Consequently, there is no right to control issue present. Indeed, as the government observes, "[r]efusal to supply containers was only a means chosen by the parties to the Rules on Containers to enforce them and, as such, was an inherent element in the secondary boycott itself. . . ." Cert. Pet. at 22.

The Court of Appeals for the District of Columbia Circuit has in the past criticized at length the right to control doctrine. See *Local 636, United Association Contractors Ass'n of Detroit*, 430 F.2d 906, 908-11 (D.C. Cir. 1970), and *Local 742, United Bhd. of Carpenters (J.L. Simmons Co.)* v. *NLRB*, 444 F.2d 895, 899-903 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 986; *Enterprise Ass'n of Pipefitters* v. *NLRB*, 521 F.2d 885, 901-03 (1975). It now has grossly misapplied that doctrine to a situation where the issue does not even arise. We therefore urge this Court to reiterate the principles it established in *NLRB* v. *Enterprise Ass'n of Pipefitters*, 429 U.S. 507 (1977), and thus reduce the possibility of further confusion in the application of the right to control doctrine.

III. THE COURT OF APPEALS IMPROPERLY IGNORED THE PRACTICAL EFFECT OF THE RULE ON CONTAINERS, WHICH IS TO RESTRAIN COMPETITION BASED UPON TECHNOLOGY AND EFFICIENCY OF OPERATION, AS WELL AS COMPETITION BASED UPON LABOR RATES

The court of appeals' approach to "work preservation" in this case, if upheld, would foreclose victims of product boycotts from overcoming a "work preservation" defense under practically all circumstances, unless, perhaps, the service or product being supplied is completely unlike that which has been used before. In applying the concept of "traditional work patterns" in a straitjacket fashion, the court would seemingly eliminate factors such as the need to perform work at a different location (*e.g.*, in a factory rather than at the jobsite) in evaluating product boycott disputes.

The broad policy implications of the circuit court's opinion are disconcerting. Not only would the court's analysis lead to a probable reduction, if not elimination of the cost-reducing efficiencies inherent in cargo container development, but its analysis could be applied to the detriment of other forms of innovative and economical techniques that have resulted from technological breakthroughs. Thus, in the construction industry, in particular, the use of prefabricated, prefinished and factory-assembled components represents significant economic gains for the entire nation. Yet, under the circuit court's overly-broad protection of restrictive union work rules, the secondary boycott prohibitions of the Labor Act, which are designed in part to facilitate technological progress, would be thwarted. Equally important, but unrecognized in the circuit court's opinion, would be the conflict with the antitrust laws engendered by its analysis.

Implicit in any rejection of the Board's limitations on secondary product boycotts is their relationship with the antitrust laws. When an employer and a union agree that the employer will refuse to handle a particular product, specified for a job or purchased by the user or another employer, it thereby precludes use of the product by the third party. This is precisely the type of union-employer combination found to violate the antitrust laws in *Allen Bradley* v *IBEW, Local 3*, 325 U.S. 797 (1945), and the reason that the Court, in *National Woodwork*, was careful to point out that it was expressing no view upon the antitrust limitations on work preservation or extension agreements. 386 U.S. 612, 631, n.19.

Since then, however, the relationship between the Labor Act's secondary boycott proscriptions and the role of the antitrust laws has been examined and explicated in the course of litigation, specifically with respect to cargo container rules. Thus, in *Consolidated Express* v. *New York Shipping Ass'n*, 602 F.2d 494 (3d Cir. 1979), suit was brought against the parties to the unlawful agreements (*i.e.*, the container rules) under Section 303 of the Taft-Hartley Act and under antitrust laws. In district court, plaintiffs asked for summary judgment on the issue of liability because of the NLRB finding, enforced by the Second Circuit, that the container rules violated the Taft-Hartley Act. The district court denied summary judgment, but on appeal, the Third Circuit held that the district court was wrong: where a secondary boycott finding by the NLRB has been made

final via enforcement proceedings, the injured party is not required to prove liability again in a suit for damages. Rather, the Board's finding is controlling in the Section 303 suit on both factual and legal issues, and the only issue for the district court is the amount of damages. As to the antitrust claims, the Third Circuit held that as victims of an illegal secondary boycott, plaintiffs are entitled to injunctive relief and a declaratory judgment under the Sherman Act. Also, they may recover treble damages under the Clayton Act unless the defendants can establish, under the court's three-step test, that they could not reasonably have foreseen, when they negotiated the container work rules, that the rules would be declared illegal.

By ignoring the antitrust implications of its decision, the court below overlooked the teachings of this Court's opinions in *Connell Construction Co., Inc.* v. *Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616 (1975), and *Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676 (1965), which underscored the need to evaluate secondary-objective issues in terms of their anticompetitive effects. By diluting the effectiveness of the Board's remedies against product boycotts, the court below (apparently unknowingly) undercut antitrust policy as well by introducing a standard that may insulate container work rules even though their anticompetitive effects be "undisputed," "significant," "uncontested," and "[not] justified by their advancement of legitimate labor goals." *Consolidated Express*, 602 F.2d at 518.

CONCLUSION

For the foregoing reasons, the decision of the court below should be reversed as prayed for in the petition of the National Labor Relations Board.

Respectfully submitted,

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